U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 176 52622 Office: CALIFORNIA SERVICE CENTER Date: DEC 17 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is in the painting business. It seeks to employ the beneficiary permanently in the United States as a sign painter. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on January 16, 1998. The proffered salary as stated on the labor certification is $21 per hour or $43,680 per year.

With the petition, counsel submitted copies of its 1998 through 2001 Forms 1120, U.S. Corporation Income Tax Returns. The 1998 return reflected a taxable income before net operating loss deduction and special deductions of $87,432 and net current assets of $16,887.

The 1999 return reflected a taxable income before net operating loss deduction and special deductions of $9,652 and net current assets of -$507.

The 2000 return reflected a taxable income before net operating loss deduction and special deductions of $4,580 and net current assets of $3,443.

The 2001 return reflected a taxable income before net operating loss deduction and special deductions of $96,170 and net current assets of $47,535.

The director considered this documentation insufficient, and, on August 21, 2002, he requested additional evidence of the petitioner's ability to pay the proffered wage to be in the form of copies of annual reports, federal tax returns with appropriate signature(s), or audited financial statements. The director specifically requested that the petitioner provided signed and certified copies of the U.S. company's federal income taxes.

In response, counsel provided signed copies of the previously submitted tax returns and a letter from Nadadur Vardhan that states:

> I am enrolled to practice before the Internal Revenue Service/US Treasury and I have been practicing for more than 10 years.
>
> I reviewed the following:
>
> 1. 1120 - U.S. Corporation Income Tax Return for the Corporation for the years 1997, 1998, 1999, 2000 and 2001 along with the schedules and attachments.
>
> The financial strength of the corporation has gone up multifold in the year 2001 and 2002 to date.
>
> In evaluating the ability of the company to pay the proffered wages I have taken into account the cash flow of the Corporation, the gross and net profit of the Corporation for the time period.
>
> While the net profit in itself is sufficient to pay the proffered wages, the cash flow and gross receipts establish beyond any doubt the corporation indeed had and continues to have the clear ability to pay the proffered wages.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 7, 2003, denied the petition.

On appeal, counsel submits a copy of the petitioner's 2002 Form U.S. Corporation Income Tax Return. The return reflects a taxable income before net operating loss deduction and special deductions of $27,484 and net current assets of $246,491. Counsel states:

> We respectfully disagree with the Service. The ability of a petitioner to pay proffered wages must be judged from the cash flow of the company and not taxable income. The petitioner submitted expert testimony from a tax and financial consulting company documenting the ability of the company documenting [sic] based on cash flow. The

> Service apparently does not attach any credence to this. It is industry wide standard and prudent fiscal policy to examine cash flow as the most critical component of the ability of a company to meet its financial obligations. . . .

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 1998 through 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and

current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the years in question, 1998 through 2002, were $16,887, -$507, $3,443, $47,535, and $246,491. The petitioner could not have paid the proffered wage in 1998, 1999, or 2000 from its net current assets.

Counsel refers to the letter from [redacted] an expert, who documents the petitioner's ability to pay the proffered wage based on cash flow. The letter is in the record; however, Mr [redacted] merely states that he has reviewed the petitioner's tax returns and based on net profit, cash flow, and gross receipts, he contends that the petitioner has the ability to pay the proffered wage. Mr. [redacted] has not, however, explained how he reached his conclusions and has not provided any precedent decisions in support of his conclusions. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. § 103.9(a). The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International,* 19 I&N Dec. 791 (Comm.1988).

The 1998 return reflected a taxable income before net operating loss deduction and special deductions of $87,432 and net current assets of $16,887. The petitioner could pay the proffered wage from its taxable income.

The 1999 return reflected a taxable income before net operating loss deduction and special deductions of $9,652 and net current assets of -$507. The petitioner could not pay the proffered wage from either its taxable income or its net current assets.

The 2000 return reflected a taxable income before net operating loss deduction and special deductions of $4,580 and net current assets of $3,443. The petitioner could not pay the proffered wage from either its taxable income or its net current assets.

The 2001 return reflected a taxable income before net operating loss deduction and special deductions of $96,170 and net current assets of $47,535. The petitioner could pay the proffered wage from either its taxable income or its net current assets.

The 2002 return reflects a taxable income before net operating loss deduction and special deductions of $27,484 and net current assets of $246,491. The petitioner could pay the proffered wage from its net current assets.

The petitioner has not established its ability to pay the proffered wage in 1998 and 1999.

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prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.